of a party to a contract being recognized by the law as a property right and as such protected against some wrongful acts, equity, in giving a remedy to protect this legal right where no action is allowed at law, would merely be acting within the established scope of its concurrent jurisdiction.[23] An example of this sort of exercise of equity jurisdiction is the granting of an injunction to the remainderman to prevent the wanton destruction of the estate by the life tenant, without impeachment for waste, though no action exists at law for such an injury.[24] And, similarly, equity in protecting the *jus disponendi* of property by removing clouds upon title is securing an interest recognized by the law in cases where no remedy is given at law for the particular injury.[25] Finally, in such a case, it may be possible to view the right of action of the directly injured party, the Ohio company, against the wrongdoers, as held partly for the benefit of the promisee, the New Jersey corporation. An injunction might then conceivably be granted at the suit of the New Jersey corporation, joining the Ohio company as a codefendant, on analogy to a suit by a *cestui que trust* against a recusant trustee and a third party obligor to enforce an obligation held by the trustee for the benefit of the *cestui*.[26]

SOLDIERS' WILLS OF PERSONALTY. — The practice of exempting soldiers from the ordinary requirements concerning formalities in the making of testamentary dispositions had its origin in the Roman law. It was unknown to the republic, and was first introduced by Julius Cæsar.[1] It has continued in some form down to the present time, and still exists in the civil law.[2] The privilege made its first appearance in Anglo-American law in the Statute of Frauds,[3] was continued in the Wills Act,[4] and now exists in Canada [5] and most of the United States.[6]

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[23] See 27 HARV. L. REV. 668.

[24] Vane *v.* Barnard, 2 Vern. 738 (1716); Aston *v.* Aston, 1 Ves. 264 (1749).

[25] Gage *v.* Rohrbach, 56 Ill. 262 (1870); Sullivan *v.* Finnegan, 101 Mass. 447 (1869).

[26] See AMES, CASES ON TRUSTS, 67, note. As a prerequisite to such an action, the *cestui que trust* ordinarily must show that the trustee was requested to sue and failed to do so. Fletcher *v.* Fletcher, 4 Hare, 67 (1844); Gandy *v.* Gandy, 30 Ch. D. 57 (1885). Some courts, however, hold that mere neglect of the trustee to sue is sufficient. Kelly *v.* Larkin, [1910] I. R. 550. See Mason *v.* Mason, 33 Ga. 435 (1863).

The interests of the *cestui que trust* and of the recusant trustee are recognized as sufficiently distinct to give a federal court jurisdiction on the ground of diversity of citizenship, though the citizenship of the trustee and of the obligor are identical. Reinach *v.* Atlantic & G. W. R. Co., 58 Fed. 33 (1878).

[1] See *Ex parte* Thompson, 4 Bradf. Surr. (N. Y.) 154, 157 (1856). See also MUIRHEAD, ROMAN LAW (2 ed.), 320.

[2] France, CIVIL CODE, Art. 93, 981–98; Germany, DES REICHSMILITARGESETZES VOM 2 MAI, 1874, § 44. See Matter of Smith, 6 Phila. (Pa.) 104, 105 (1865).

[3] See 29 CAR. II, § 23.

[4] See 1 VICT. c. 26, § 11.

[5] British Columbia, 61 VICT. c. 193, § 9; Manitoba, REV. STAT. c. 150, § 8; New Brunswick, CONSOL. STAT. c. 77, § 6; Nova Scotia, REV. STAT. c. 89, § 8; Ontario, 1897, REV. STAT. c. 128, § 14.

[6] Anderson *v.* Pryor, 10 Sm. & M. (Miss.) 620 (1848); Van Deuzer *v.* Gordon, 39 Vt. 111 (1866). See 1 STIMSON, AMERICAN STATUTE LAW, § 2700; 1 REDFIELD, WILLS (4 ed.), 185.

Cæsar seems to have given the privilege to all soldiers;[7] the restriction that the soldier must be *in expeditione* was first laid down by Ulpian [8] and was adopted by Justinian.[9] The modern statutes all require that he be in actual military service. This has been construed to include a soldier in winter quarters in the enemy's country,[10] in a military hospital,[11] on the march toward the enemy,[12] or from one regiment to another in the field;[13] and he is even said to be in actual service as soon as the order for mobilization is given.[14] But a soldier is not in actual service when home on a furlough,[15] or when enrolled in a volunteer company not yet mustered into service.[16] The exact form of such testaments was not prescribed in the civil law,[17] though it was said at one time that whatever the soldier should write upon the sand with his sword would be good; but the modern French law requires at least a writing, two witnesses, and a signing by the testator.[18] Under American and English law no writing is necessary, and the will may be proved by one witness.[19] The ordinary rule of nuncupative wills that the testator must be *in extremis* does not apply to soldiers,[20] but it seems that *rogatio testium*, a calling upon the witnesses to bear witness that this is the testator's will, is essential.[21]

Cæsar apparently intended the privilege as a reward for the soldier's services,[22] whereas Justinian based it upon the extreme ignorance of soldiers in such matters,[23] a truly remarkable reason for relaxing the

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[7] See MUIRHEAD, ROMAN LAW (2 ed.), 320. The word "soldier" includes "all who hold commissions or warrants, or are borne on the rolls as enlisted men, and who are in actual military service." See GARDNER, WILLS, 61.

[8] See DE FRESQUÉT, TRAITÉ DE DROIT ROMAIN, 393.

[9] See INST. JUST., Lib. II, tit. XI. In the Roman law, only a soldier could die partly testate and partly intestate. See HALLIFAX, CIVIL LAW (Geldart's ed.), 48.

[10] Leathers *v.* Greenacre, 53 Me. 561 (1866).

[11] Gould *v.* Safford, 39 Vt. 498 (1866).

[12] Botsford *v.* Krake, 1 Abb. Pr. N. S. (N. Y.) 112 (1866).

[13] Herbert *v.* Herbert, D. & Sw. 10 (1855).

[14] Gattward *v.* Knee, [1902] P. 99. But *cf.* White *v.* Repton, 3 Curt. Eccl. 818 (1844).

[15] Matter of Smith, *supra*, note 2.

[16] Pierce *v.* Pierce, 46 Ind. 86 (1874).

[17] See 2 DOMAT, LES LOIS CIVILES, § 3071.

[18] See 2 DOMAT, LES LOIS CIVILES, § 3073, 3076. See also MOURLON, CODE NAPOLÉON, § 802, "*Il doit être signé par le testateur . . . Il doit être signé par l'officier ou les officiers qui l'ont reçu et aussi par les deux temoins.*"

[19] See Goods of White, 22 L. Rep. (Mass.) 110, 114 (1858); *Ex parte* Thompson, 4 Bradf. Surr. (N. Y.) 154, 158 (1856).

[20] Leathers *v.* Greenacre, *supra*, note 10. See Botsford *v.* Krake, 1 Abb. Pr. (N. S.) (N. Y.) 112, 120 (1866). But see Hubbard *v.* Hubbard, 12 Barb. (N. Y.) 148, 156 (1851). See REDFIELD, WILLS (4 ed.), 190, 201. Statutes sometimes require that the soldier be *in extremis*. See 1910, OKLA. REV. LAWS, § 8343.

[21] See PAGE, WILLS, § 237; 1 WOERNER, AMERICAN LAW OF ADMINISTRATION (2 ed.), § 45. On the general subject of this paragraph see 1 SCHOULER, WILLS (5 ed.), §§ 366–68.

A similar privilege is extended to "mariners at sea." This has been held to include a cook on a vessel lying at a wharf. *Ex parte* Thompson, *supra*, note 1. Likewise, a lady typist on the *Lusitania* was held to be within the statute. In the Goods of Hale [1915] 2 Ir. 362. But a mariner who is merely a passenger at the time is not included. Warren *v.* Harding, 2 R. I. 133 (1852). See also *In re* Gwin's Will, Tuck. Surr. (N. Y.) 44 (1865).

[22] See MUIRHEAD, ROMAN LAW (2 ed.), 320.

[23] See INST. JUST., Lib. II, tit. XI. "*Supradicta diligens observatio, in ordinandis*

ordinary safeguards. But in the modern civil law the real reason for the rule is to be found in the probability that, owing to the dangers and uncertainties of his business, it will usually be very inconvenient, if not impossible, for the soldier to comply with the ordinary formalities of execution.[24] This is unquestionably the reason underlying the privilege as it exists in England and the United States.[25]

One of the most difficult questions that is likely to arise on this subject is whether the statutes remove the disability of infancy. It has been the practice in England to admit infant soldiers' wills of personalty to probate,[26] and although the only foundation in authority for this practice is an *ex parte* decision by Sir Herbert Jenner Fust made on motion,[27] the text writers seem to have accepted it without question.[28] Several *dicta*, however, in the more recent English cases have, at least by implication, discountenanced the practice.[29] In the recent case of *In re Wernher*,[30] the court delivered a vigorous and learned *dictum* to the effect that infant soldiers' wills of personalty are not valid under the Wills Act. At common law, an infant of fourteen might make a will of personalty,[31] and this was unaffected by the early statutes, for they dealt only with realty.[32] The Statute of Frauds prescribed certain formalities for a nuncupative will of personalty,[33] but provided that soldiers in actual service might bequeath their personalty as before the

testamentis, militibus propter nimiam imperitiam constitutionibus principalibus remissa est."

[24] See 2 DOMAT, LES LOIS CIVILES, §§ 3001, 3069. That this is the reason is also indicated by the fact that the will is only good for six months after the soldier returns to normal conditions of life. See MOURLON, CODE NAPOLÉON, § 806. "*La loi veut que le testateur, revenu dans un lieu où il a la liberté d'employer les formes ordinaires, teste de nouveau et selon le droit commun. Elle lui accorde toutefois un délai à cet effet. Le délai est de six mois, à compter de son retour dans le lieu où il à la liberté de tester selon la forme ordinaire.*"

[25] See *In re* Hiscock, [1901] P. 78, 80; Hubbard *v.* Hubbard, 12 Barb. (N. Y.), 148, 155 (1851).

[26] *In re* McMurdo, L. R., 1 P. & D. 540 (1867); *In re* Hiscock, *supra*, note 25.

[27] *In re* Farquhar, 4 Notes of Cases, 651 (1846).

[28] See THEOBALD, WILLS (7 ed.), 19; FLOOD, WILLS, 367; 1 WILLIAMS, EXECUTORS (7 Am. ed.), 172.

[29] See *In re* D'Angibau, 15 Ch. D. 228, 241 (1880): "No will can be made by an infant;" In the Goods of Hale, [1915] 2 Ir. 362, 369: "All that the 11th section does is to release persons so situated from certain obligations as to execution and verification which were imposed for the first time, for the protection of the public generally, by the Wills Act; and the difficulties that have arisen, and the cases that have been decided on this branch of the law show how unreasonable it would have been to exact obedience to these obligations from persons in the position of soldiers and seamen when in service;" *In re* Limond, [1915] 2 Ch. 240; soldiers' and sailors' wills "are left entirely unaffected in respect of execution and attestation by the provisions of the Act."

[30] 34 TIMES L. REP. 191 (1918). The will was properly executed, and the only question was as to infancy. The exact question was whether the will was sufficient to execute a general power over personalty, and as the will had already been admitted to probate, the court held the power well executed. See SUGDEN, POWERS, 178. It appears that under some circumstances an infant might exercise a power collateral when he could not dispose of his own property, and the only apparent reason for this is that it requires more discretion to dispose of one's own property than that of other persons. Per Sir George Jessel in *In re* D'Angibau, 15 Ch. D. 228, 233 (1880).

[31] See 1 WILLIAMS, EXECUTORS (6 Am. ed.), 19 *et seq.*; 2 BLACKSTONE, COMMENTARIES, 497; COMYN'S DIGEST, Devise H 2.

[32] See 34 & 35 HENRY VIII, c. 5, § 14.

[33] See 29 CAR. II, c. 3, § 19.

Act.[34] No provision had yet been made as to age, so that until 1837 an infant of fourteen might make a will of personalty. Section 7 of the Wills Act provided that no will by a person under twenty-one should be valid,[35] and section 11 provided that a soldier in actual service might bequeath his personal estate as he might before the making of the act.[36] If the section is read literally, an infant soldier may certainly bequeath his personalty. But it is in the form of a proviso, and it is believed that it is intended to qualify only the sections immediately preceding which deal with execution. That this is true is indicated by the fact that the section is taken from the Statute of Frauds [37] which made no provision as to age, and, moreover, by the very reasons underlying the privilege. The situation of the soldier may make proper execution difficult, but it can hardly increase his discretion. Furthermore, the Report of the Real Property Commissioners, upon which the Wills Act is based, indicates that it was not intended to extend the privilege to infants.[38] There is a square American decision under a very similar statute which accords with this view.[39] Although the section was borrowed from the civil law,[40] it affords little aid in construing the statute. It is true that Augustus permitted soldiers still subject to the *patria potestas* to make their wills as if *sui juris*,[41] but in continuing this rule Justinian required that such soldiers should comply with all the usual formalities of execution.[42] No trace of such a special privilege to infant soldiers has been found in the modern civil law.

In the present state of the authorities it may fairly be said that the question is still *res integra* in England. It is to be hoped that, if the question arises squarely for decision, the English court will hold such a will invalid.[43]

DISCRIMINATION BY A NATURAL GAS COMPANY. — It is axiomatic that, ordinarily, a public service company must extend its facilities to

[34] See 29 CAR. II, c. 3, § 23: "Provided always, that notwithstanding this Act, any soldier being in actual military service, . . . may dispose of his movables, wages, and personal estate, as he or they might have done before the making of this Act."

[35] See 1 VICT. c. 26, § 7.

[36] See 1 VICT. c. 26, § 11: "Provided always, and be it further enacted, that any soldier being in actual military service, . . . may dispose of his personal estate as he might have done before the making of this Act."

It is to be noted that the language of this section does not so clearly qualify *all* the provisions of the Act as the corresponding section of the Statute of Frauds.

[37] See *In re* Limond, [1915], 2 Ch. 240, 248.

[38] FOURTH REPORT OF THE REAL PROPERTY COMMISSIONERS, 22, 23 (1833).

[39] Goodell *v.* Pike, 40 Vt. 319 (1867).

[40] See Drummond *v.* Parish, 3 Curt. Eccl. 522, 531 (1843). It appears from the preface to the life of Sir Leoline Jenkins, who was instrumental in preparing the Statute of Frauds, that he took considerable credit to himself for having secured to English soldiers the same privilege in bequeathing their property as that enjoyed by the Roman soldiers.

[41] See MUIRHEAD, ROMAN LAW (2 ed.), 322. This was later extended by Hadrian to those who had obtained an honorable discharge. *Ibid.*

[42] See INST. JUST., Lib. II, tit. XI. "*Sed testari quidem, etsi filiifamiliarum sunt, propter militiam concedunter, jure tamen communi, eadem observatione et in eorum testamentis adhibenda, quam et in testamentis paganorum proxime exposuimus.*"

[43] This result may well be deemed undesirable, but the remedy, of course, is with Parliament.